

FEDERAL PREEMPTION, AND FEDERAL COMMON LAW, IN NUISANCE CASES

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INTRODUCTION: A BACKWATER IN A GROWTH INDUSTRY

As we move our way firmly into the twenty-first century, extensive regulation by all levels of government forms a permanent part of the legal landscape.¹ The moment two levels of government can act on the same subject matter, some rules of federal preemption are needed to resolve the conflict across the full domain of cases. Michael Greve and Jonathan Klick's recent survey of the preemption cases in the Rehnquist Court is dominated by the kinds of issues we expect to see front and center in the modern social democratic state: labor and employment leads the list with thirty-two entries; economic regulation follows in second place with seventeen; transportation and infrastructure follows with fifteen. In fourth place comes health, safety, and environmental regulation, as an undifferentiated mass of thirteen cases.² As is typical of modern law, Greve and Klick's broad categorization lumps together all cases of personal injury and property damage as tort cases. More concretely, it does not distinguish those harms that arise out of consensual arrangements such as medical malpractice, where the state chooses to override the joint judgment of the parties, from traditional tort cases intended to protect one individual against physical harms to which there has been no antecedent consent.³ The huge expansion in modern tort law lies in the domain of consensual injuries. In this Article, I put these cases aside to concentrate exclusively on the stranger cases—here, the few

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¹ For a systematic overview of this subject, see *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS* (Richard A. Epstein & Michael S. Greve eds., 2007). Our two contributions to this volume are: Richard A. Epstein & Michael S. Greve, *Introduction: Preemption in Context*, at 1 [hereinafter Epstein & Greve, *Preemption in Context*]; Richard A. Epstein & Michael S. Greve, *Conclusion: Preemption Doctrine and Its Limits*, at 309 [hereinafter Epstein & Greve, *Preemption Conclusion*].

² Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 50 (2006).

³ For more on this distinction, see *infra* notes 35–36.

modern cases that grapple with liability for common law nuisances—a topic that far antedates the rise of the welfare state.⁴

These common law cases are of intrinsic interest in their own right; the law of nuisance contains hidden complexities and intellectual sophistication that demonstrate both the uses and limitations of standard libertarian theory.⁵ No systematic account of the field can avoid dealing with the division of the instruments of social control between private litigation and more comprehensive forms of direct regulation.⁶ The law of nuisance also plays, or at least played, a critical role in determining the scope of constitutional protection that is, or should be, afforded to private property.⁷ And it turns out to play a critical role in the articulation of the key matters of federalism and judicial power under the Constitution as well. This topic has not occupied center stage in the many excellent treatments of preemption law. But it deserves a more systematic examination of its own, one that I believe vindicates the use of the *federal* common law of nuisance to resolve disputes that take place between different states, or between citizens of different states. In exploring these issues, this Article attempts to fill that gap in an area that was subject to constant litigation long before the expansion of federal power was ratified in such cases as *Wickard v. Filburn*⁸—which, by expanding federal power, expanded the arena for federal preemption.

The purpose of this Article is to trace the constitutional minuet between legislation and common law. The problem here is more difficult than might be expected because both litigation and regulation operate at both levels of our federal system. The most common form of interaction asks whether federal law blocks the preservation of state common law rights.⁹ In large measure, that debate is guided by the Supremacy Clause in Article VI, Clause 2, which provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding.¹⁰

⁴ C. H. S. FIFoot, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 3–23 (1949); see also Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974).

⁵ See Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

⁶ *Id.* at 98–102.

⁷ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). For earlier versions, see *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878).

⁸ 317 U.S. 111 (1942).

⁹ See, e.g., *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

¹⁰ U.S. CONST. art. VI, cl. 2.

But in the area of interstate nuisance cases, statutory (but not federal) preemption is also invoked in connection with the preemption of *federal* common law by *federal* statute. In both of these contexts, the ultimate question of coordination is a matter of statutory construction. If Congress makes it clear that a private right of action survives, then the debate over the federal preemption of state law is over. Conversely, if the statutory language makes clear that state law should be preempted, the matter is ended, but with the opposite result. In the federal-federal cases, the matter is somewhat more complex. Structurally, if Congress makes clear that a federal statute preempts the federal common law, then that is the end of it. Likewise, if it indicates that this body of law should survive, then so it will—at least in those cases where, unlike the diversity cases in *Erie Railroad Co. v. Tompkins*,¹¹ there is a federal common law.

Yet even though the lexical priority of statutes over common law rules is the same in both settings, it is clear that in those cases where statutory text does not resolve the problem, the presumption on preemption differs from the federal-federal to the federal-state context. On matters of federal-state regulation, the basic presumption is one against preemption, subject to some key exceptions. Justice William O. Douglas set out the basic rule as follows:

[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute.¹²

The basic logic of this position reflects the effort of the post-New Deal judges to reconcile their two dominant strains of thought: the priority of national over state regulation, and the desirability of state regulation—

¹¹ 304 U.S. 64 (1938).

¹² *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citations omitted). For our criticism of this rule, see Epstein & Greve, *Preemption Conclusion*, *supra* note 1, at 315–16, which argues that the decision itself did not raise any real preemption issue at all because the applicable statute, the 1931 United States Warehouse Act, gave individual warehouse operators the unfettered choice to subject themselves to the “exclusive jurisdiction” of the United States Secretary of Agriculture. See Warehouse Act, Pub. L. No. 71-772, 46 Stat. 1463, 1465 (1931). By refusing to address the exclusive jurisdiction language, Justice Douglas made all preemption cases turn on a set of presumptions that were not relevant to the case. None of the details of the particular case reflect the subsequent evolution of the doctrine.

remember *Lochner v. New York*¹³—in the absence of any federal law to the contrary.

The logic works quite differently in federal common law nuisance cases because neither of these elements is present. Here we do not deal with governmental regulation of market transactions; nor is there any clash between federal and state sovereigns. No longer do the dominant concerns involve the government's power to regulate. Instead, the discussion moves in two different directions. The first addresses the need for the federal government to adjudicate (in the state v. state cases) disputes between rival sovereigns within a federal court system. The second wrestles with the much-mooted question of whether the judicial power of the federal courts under Article III allows them to create and apply federal common law rules. On this second issue, there is also a shift during the New Deal era, but it is that from *Swift v. Tyson*,¹⁴ which accepted federal common law in diversity cases, to *Erie Railroad Co. v. Tompkins*,¹⁵ which rejected it. The *Erie* spill-over to other types of Article III disputes was never strong enough to block all use of the federal common law, but it was strong enough to reverse, or at least neutralize, the presumption against preemption that controls in federal-state cases.

The purpose of this Article is to weave together these various legal crosscurrents in the regulation of nuisances in interstate disputes. Part I offers a brief overview of the law of nuisance, which generally regulates “nontrespassory invasions,” most notably, harms by pollution and other forms of discharge between neighbors. That body of law has private and public sides, both of which are of long-standing origin. The invasive emission of pollution or other forms of discharge counts as a prima facie wrong under just about any coherent theory of law. Accordingly, in this context, the claims for regulation at either or both levels must be treated with respect in any political theory of government, including those in the classical liberal tradition of limited government and strong property rights. Interstate disputes over water and air pollution were common before the New Deal because pollution has the capacity to migrate long distances, which increases the odds that it will cross state boundaries. The regulation of pollution is legitimate even if we reject, as we should, the extended view of governmental power that the Progressives championed.¹⁶ The emphasis in Part I is on the operation of the law of nuisance within a unitary legal system that has available both common law and statutory remedies.

Part II extends this analysis to determine the best combination of common law and regulatory approaches to nuisance cases in a federal sys-

¹³ 198 U.S. 45 (1905).

¹⁴ 41 U.S. (16 Pet.) 1 (1842).

¹⁵ 304 U.S. at 80.

¹⁶ See RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006) (contrasting classical liberal and progressive approaches).

tem, and concludes that the active use of federal common law helps to achieve this end. Part III offers a brief account of how it lies within the scope of Congress's power to adopt that approach today. The basic conclusion is that within a unitary system, the proper rule never allows the defendant to use compliance with any direct scheme of regulation to bar a common law right of action for harm. In these cases, the presumption against preemption, however misguided in other areas, leads to the right result by allowing private rights of action under either state or federal common law to survive the passage of direct schemes of regulation. This result should hold in this context even though there are powerful reasons to distrust the use of dual systems of regulation. In my view, the appropriate response, even after the expansion of the federal power, is to adopt a preemption regime that follows the maxim, "one problem, one sovereign."¹⁷

I. THE CONTROL OF NUISANCES WITHIN A SINGLE JURISDICTION

A. *The Variety of Nuisances*

The common law has supplied a remedy for ordinary nuisances since the earliest days of English law. It has long been understood that the discharge of noxious substances into the air or the water lay at the core of the law of nuisance. Armed with that insight, the English common law waged a two-front war by supplying remedies to private and public nuisances. That dual approach was necessary because nuisances come in many shapes and sizes. The formal definition of a nuisance stresses that it involves a nontrespassory invasion of noises, odors, liquids or other kinds of substances.¹⁸ This definition makes it appear as though all nuisances should be treated alike, but for strong practical reasons that has never been the case. A single speck of dust can count as as much of a nontrespassory invasion as a chimney full of soot. The choice of legal approach depends not only on the existence of some nontrespassory invasion, but also on the answers to two key questions: how severe is the invasion, and how many people does it touch? Other adjacent areas of tort law raise similar problems. Flooding does not involve pollution in the ordinary sense, but the waters that start in one location could easily move great distances to others, in either a torrent or a trickle. The varying size and incidence of these admitted wrongs present more complex regulatory challenges than ordinary trespass, where one person enters the land of another, or perhaps constructs an overhang over someone else's property. It is much easier in ordinary trespass to adhere to a strict "keep off" regime across a broad class of cases. The same conclusion applies to the common forms of noninvasive nuisance, involving lat-

¹⁷ Epstein & Greve, *Preemption Conclusion*, *supra* note 1, at 311–12.

¹⁸ See RESTATEMENT (SECOND) OF TORTS § 821D (1979) ("A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land.").

eral support and spite fences, which also tend to be localized disputes between immediate neighbors.¹⁹

B. *Private Nuisances*

The two available methods of controlling nuisances are private litigation and state regulation. Within a unitary jurisdiction, the distinctive challenge is to find the appropriate mix of the two. The first part of that analysis seeks to carve out those instances of physical harm that are amenable to ordinary lawsuits for trespass to land or for injury to the person. Large, concentrated emissions of smoke and filth to immediate neighbors fit that bill. In these contexts, the influential decision in *Fletcher v. Rylands*²⁰ set the basic pattern of analysis. *Rylands* recognizes that the plaintiff may bring a suit under a strict liability theory against any defendant who collects or accumulates water on his own property which then escapes onto and floods a plaintiff's land.²¹ The flooding in *Rylands* occurred in a discrete burst when the foundations of a reservoir broke as it was being filled.²² This case shows how the one-on-one model of tort litigation works in the case of a large and discrete harm against a single individual. Indeed, the logic of *Rylands* extends to concentrated and unitary invasions of all sorts, which was the position that Lord Blackburn took when he fashioned his strict liability rule:

The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property.²³

The explicit point of symmetry in these cases is that "the person" who is injured by "his neighbour" should be entitled to his own cause of action because of the perceived claim of justice between the parties. The model is that of a one-on-one interaction that is not dissimilar to a collision between two vehicles that takes place on the highway. *Rylands* accepts the dominance of a private right of action without so much as a second thought. The only topic of debate for the judges was the choice between a rule of negli-

¹⁹ For a discussion of these issues, see generally Epstein, *supra* note 5.

²⁰ See (1866) 1 L.R. Exch. 265, *aff'd*, (1868) 3 A.C. 330 (H.L.).

²¹ *Id.* at 280.

²² *Id.* at 269.

²³ *Id.* at 280.

gence for operations on the land or the strict liability rule (for which *Rylands* opted) for releases associated with those losses.

Recognizing a private right of action represents only the first stage in organizing this branch of the law. The next inquiry is whether the neighbor at risk should be entitled to injunctive relief before any actual harm occurs. Without question, the law must place limits on such injunctions; otherwise no one could ever build a reservoir, fire, or privy, or bring water or animals on his lands. The claim that such broad private injunctions would be a death knell to industrial development surely is credible.²⁴ But it is a complete non sequitur to assume that a strict liability rule that awards damages for past harms will have the same effect. In fact, most torts involve negligence in some phase of the activity, so the increased incidence of liability in the shift from negligence to strict liability is too small to work major transformations in economic life.²⁵ The small additional number of successful suits is typically offset by the greater simplicity of the strict liability system, which need not address the vexing questions of what antecedent precautions should have been undertaken and whether they would have made any difference. Rather than shutting down, individual land owners need only obtain insurance against the harms that they might cause and invest in precautions to see that those harms do not come to pass. They would rarely choose to shut down altogether, no matter what rule of liability is in effect. But a broad injunction does shut businesses down, categorically, regardless of their ability to obtain insurance. Hence the usual problem of whether to narrow the injunction or phase in its restrictions.

The example just posed presumed that only one person stood at risk that his mine would be flooded. Under these circumstances, that person has the right incentives to seek injunctive relief because no one else will do it for him. He pays the full costs of the suit and reaps its full benefit. But in most institutional settings, including flooding and pollution, the potential plaintiff is not the only person who could be hurt. In these situations, it is far less likely that one person will agree to pay the full costs of seeking an injunction against some future harm where he will derive only a fraction of the benefit from that injunction. Yet if the parties are diffuse, it will be difficult to forge an alliance whereby they all agree to divide the expenses of litigation. In the extreme case, no one would expect a pedestrian who was hurt by an errant driver to seek to bar him from the highway simply because that driver is almost certain to hit someone else in the future. In these cases, the state, as owner of the highway, licenses all drivers before they can do harm and may suspend the licenses of those who have caused harm. This basic pattern carries over to nuisance cases. Ex post individual actions

²⁴ For two famous statements of the position, see *Turner v. Big Lake Oil Co.*, 96 S.W.2d 221, 226 (Tex. 1936), and *Brown v. Collins*, 53 N.H. 442, 449–50 (1873).

²⁵ For discussion, see Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 IOWA L. REV. 407, 409–10 (1995).

make sense for major harms, but *ex ante* injunctive relief is more likely to be sought by some centralized public authority, which can issue injunctions against wrongdoers, or more ominously issue permits before any dangerous activity is allowed to take place. It is thus possible to talk about the proper interaction of public and private remedies for private nuisances within a unitary system.

C. *Public Nuisances*

This private-public coordination also takes place in the opposite pole, with public nuisances where private rights of action are generally inappropriate. Public nuisances include the polluting of a river, or the blocking of a stream or a road, in ways that impose small harms to each of a large number of individuals. In these situations, a private right of action for damages no longer makes sense after injury has occurred, especially if the cost of suit per person exceeds the anticipated level of recovery. Similarly, it is unlikely that any individual will agree to shoulder the burden of obtaining an injunction that benefits all members of the public at large. One way to overcome the difficulty of amassing claims is to adopt a class action approach, but this approach may fail if the persons injured are not similarly situated. A second, overlapping approach uses direct regulation in which a fine substitutes for damages, and public sanctions substitute for private injunctions or other forms of specific relief. This approach was adopted in early English cases that held the blocking of a road was a public nuisance for which local officials could levy administrative sanctions.²⁶ From there, it was only a small step to say that governmental power over the roads included the ability to set reasonable regulations for their use, which is the mainstay of the modern licensing regime.

At the same time, the early approach recognized that the public system of enforcement should supersede only the large mass of undifferentiated small claims for what was termed “general damages,” but not the larger claims for individual or “special” damages that resulted from the same wrongful act. The anonymous 1536 case held that the finding of a public nuisance for blocking a road did not preclude a private right of action by

²⁶ RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 710 (9th ed. 2008) (quoting Anon., Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1536)). Judge Fitzherbert put the point with an economy that modern judges would do well to emulate:

I agree well that each nuisance done in the King's highway is punishable in the Leet and not by an action, unless it be where one man has suffered greater hurt or inconvenience than the generality have; but he who has suffered such greater displeasure or hurt can have an action to recover the damage which he has by reason of this special hurt. So if one makes a ditch across the highway, and I come riding along the way in the night and I and my horse are thrown into the ditch so that I have great damage and displeasure thereby, I shall have an action here against him who made this ditch across the highway, because I have suffered more damage than any other person. So here the plaintiff had more convenience by this highway than any other person had, and so when he is stopped he suffers more damage because he has no way to go to his close.

Id. (quoting Anon., Y.B. Mich. 27 Hen. 8, f. 27, pl. 10).

someone who crashed into the obstruction.²⁷ The intermediate case was that of the landowner whose right of access to the highway was blocked, and that too was regarded as special damages for which the private action could lie.²⁸ In a sense, therefore, both public and private nuisance law exhibit the same structure—public intervention for diffuse harms and private rights for concentrated ones. Modern law may work more proactively, but it still follows this rough division by preserving rights of action for specific harms.²⁹

D. Coordinating Regulation and Liability

The next inquiry is whether any direct public regulation should deviate from the substantive rules that govern private rights of action. The tension between regulation and a system of private rights of action is illustrated by an instructive pair of nineteenth century English cases dealing with actions for damages caused by fire when the defendant's activities were subject to direct regulation of spark emissions. In *Vaughan v. Taff Vale Railway Co.*,³⁰ Chief Judge Cockburn held that the plaintiff had to show negligence to recover damages whenever the defendant operated its railroad pursuant to statute, even if, in the absence of statute, the underlying cause of action was governed by a strict liability rule (as in the cases mentioned in *Rylands*).³¹ In effect, a defendant who took the required ex ante statutory precautions could avoid strict liability after the fact.

Taff Vale offered no detailed justification for using regulation to substitute negligence for strict liability in private rights of action. If for reasons of general efficiency the strict liability rule is preferable to the negligence rule in the absence of regulation, why does that calculation reverse itself in the presence of regulation? The compliance is easier with a bright-line rule, but many difficult questions remain in deciding the causal significance of noncompliant behavior. Predictably, *Taff Vale* elicited a strong response from Baron Bramwell in *Powell v. Fall*,³² where the defendant's operation of a traction engine along a public highway caused a fire.³³ As a matter of statutory construction, Baron Bramwell did not think that the creation of the new restrictions on spark emissions should be read impliedly to block the

²⁷ *Id.* (citing *Anon.*, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10).

²⁸ *Id.* (citing *Anon.*, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10).

²⁹ *See, e.g.*, 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1104–05 (N.Y. 2001) (finding no special damages for loss of access to midtown stores after a building collapse); *Smith v. City of Boston*, 61 Mass. 254, 255–56 (1851) (denying special harms for neighbors with partial loss of access).

³⁰ (1860) 157 Eng. Rep. 1351, 1354 (Exch.).

³¹ *Id.* (“[W]hen the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damage results from the use of such thing independently of negligence, the party using it is not responsible.”).

³² (1880) 5 Q.B. 597.

³³ *Id.*

plaintiff's right of action. More to the point, he thought that the damages action provided a test for efficiency that should not be surrendered lightly. Baron Bramwell argued:

It is just and reasonable that if a person uses a dangerous machine, he should pay for the damage which it occasions; if the reward which he gains for the use of the machine will not pay for the damage, it is mischievous to the public and ought to be suppressed, for the loss ought not to be borne by the community or the injured person.³⁴

In his view, the passage of a statute did not alter that fundamental calculation.

The stark conflict between *Taff Vale* and *Powell* is symptomatic of a larger issue that runs through tort law. If we are confident that a regulatory statute is a genuine public-regarding measure that specifies the optimal level of performance, then the tort law loses its deterrence function whenever the defendant has complied with the statute. Under this regime, the costs of litigation are unjustifiable because its only consequence is distributional—forcing the loss back on the party who caused it. That seems to be the modern equivalent of *Taff Vale*.

But now suppose that the regulation is not efficient, for example, because it was passed in response to interest group pressures. At this juncture, the preservation of the private right of action has positive allocative consequences, and not just distributional ones. In this context, there are two possible sources of error. The statutory rules could be either too strong or too weak. If the former holds, the tort system will not supply the reason for conformity, but the threat of fines or criminal sanctions will. Once that happens, the likelihood of injury drops. The role of the statute in private litigation consequently becomes less important because the frequency of suit drops. If the latter holds so that the statutory standard is too low, then a regulated firm has a strong incentive to underprovide safety to strangers because it can take advantage of the statutory bar. Under this scenario, we get too little safety in the system.

In practice we do not know which of these two risks is more likely to come to pass, but we do know something about their relative magnitudes. Let the regulations in question be too stringent, and the tort suit will have little effect on overall safety levels. Let the regulations in question be too lenient, and defendants will find unjustified safe harbors from litigation. The preferred strategy within a unified system is to treat regulations and litigation as operating in separate spheres so that each responds solely to its own imperatives. Thus, common law actions should survive without regard to the standards set out by the direct regulation.

It is, moreover, critical to the argument that this view should hold only in the case of harms against strangers, and should not apply to the torts that

³⁴ *Id.* at 601.

arise out of consensual arrangements, such as most product liability or medical malpractice cases. In these settings, the risk analysis is more complex. As a matter of first principle, because the parties are in privity, they should be in a position to maximize the joint gains between them by a contractual allocation of the risk of harm—a position for which I have argued in vain for over thirty years.³⁵ Put otherwise, assumption of risk by express agreement should be a viable defense.

That situation is very different from the stranger case, where the real risk is that without liability a defendant will ignore a plaintiff's losses and thus externalize the costs of conduct from which he draws the exclusive benefit. In that regime, assumption of risk should be a defense only in the occasional case where the plaintiff knowingly approaches some peril that she could easily have avoided. The assumption of risk defense does not have any role in dealing with pollution or flooding between neighbors. In the context of ongoing consensual relationships between the plaintiff and the defendant, however, the statutory scheme does not work to insulate a defendant from suits by strangers. Rather, it alters the balance so that the defendant is required after the injury to bear more onerous consequences than he would have agreed to undertake in the *ex ante* world. The statutory command often imposes requirements that are greater than those that would have been assumed by contract. And, even if the statute does not so require, a defendant could assume additional responsibility for a fee if further gains from trade were available. Thus, in these consensual cases, using the statute as an absolute defense does not induce a defendant to take suboptimal care. Instead, it prevents courts from imposing higher duties after the fact than it was in the interest of either party for the defendant to assume *ex ante*.

Modern law tends to disagree with this. It tends to invalidate explicit contractual defenses wholesale, and to treat as harms against strangers all harms that sellers of products or providers of health care services inflict on other people. This modern trend is wrong, and I have argued elsewhere that the statutory standards should in effect bar the private right of action in these consensual cases.³⁶ But for the purposes of this Article, the proper treatment of consensual cases does not go to the nub of the dispute. Even if my position is wrong with respect to harms that arise from business relationships, it does nothing to undermine the only conclusion for which I contend in the federalism context, which is to keep in stranger cases the systems of tort liability and regulatory control separate, just as should be done in a single jurisdiction that imposes both tort and regulatory sanctions.

³⁵ See Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1 AM. B. FOUND. RES. J. 87 (1976).

³⁶ See Richard A. Epstein, *Why the FDA Must Preempt Tort Litigation: A Critique of Chevron Deference and a Response to Richard Nagareda*, J. TORT L., Dec. 2006, <http://www.bepress.com/jtl/vol1/iss1/art5>.

The remainder of this Article examines how these questions of regulation work out in federal cases.

II. THE LAW OF FEDERAL PREEMPTION IN NUISANCE CASES

The central thesis of this Article is that nothing in principle about the remedial mix changes when either *federal* or *state* common law creates the cause of action between private parties over which a *federal* regulation is superimposed. So long as the common law only protects against adverse outcomes, no conflict arises between a federal statute that sets emissions standards, for example, and a federal *or* state common law action that offers full compensation for the harm in question. The common law remedy does not seek to alter the level of stipulated precautions, so there is no way in which its enforcement will require the defendant to engage in actions inconsistent with, or frustrate the enforcement of, the federal scheme—both of which are the common grounds for overcoming the usual presumption against preemption.³⁷ Those charges arguably could be made against a negligence cause of action, but here the response comes from another quarter. The state may allow the private right of action, but adopt the *Taff Vale* position that compliance with the federal standard is an absolute defense against the private right of action—again obviating any tension between the two standards. In either case, therefore, there is no reason why the “comprehensive” nature of the permit process should block any otherwise allowable private right of action.

A. *Early Federal Common Law in Disputes Between States*

In order to understand how this analysis plays out, it is instructive to start with the early cases that articulated a *federal* common law of nuisance for disputes between states. These disputes were part of the original jurisdiction of the Supreme Court in the early twentieth century, long before the expansion of the modern Commerce Clause³⁸ jurisprudence. Litigation offered a sensible avenue for resolving interstate disputes over pollution, which—truth be told—do not involve any commerce at all.

To see how this system worked, consider *Missouri v. Illinois*, a case that Missouri brought against Illinois as an original action in the United States Supreme Court.³⁹ In this case, Missouri unsuccessfully sought injunctive relief against Illinois for the pollution that Chicago allegedly sent its way by reversing the flow of the Chicago River so that it went south into the Illinois River until it joined the Mississippi.⁴⁰ As a matter of substantive principle, be it a state or federal issue, the same liability rules for pollution

³⁷ See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

³⁸ See U.S. CONST. art. III, § 2.

³⁹ 180 U.S. 208 (1901).

⁴⁰ *Id.* at 248–49.

should govern. Even if there were some differences in the liability rules of the two states governing this case, it is doubtful that the common law of Illinois (articulated in ignorance of the present dispute) would help its defense, or that Missouri's law (similarly articulated) would bolster its case as plaintiff. The choice of law rules do not look relevant at all. Because these common law rules were promulgated behind a veil of ignorance, everyone operates in an environment where they have strong incentives to make the right substantive choices. Such incentives might not exist in disputes where the roles of the parties were previously known. That is especially true in interstate disputes, where pollution and sewage tends to flow only in one direction. Accordingly, in these situations, state statutory law could easily show a tilt in one direction or another, as the veil of ignorance largely has been lifted.

The dangers of such special legislation help explain why the Supreme Court chose to exercise its original jurisdiction in *Missouri v. Illinois*: the dispute was too explosive to trust the courts—and more importantly, the laws—of either state. The Supreme Court adjudicates interstate disputes in our national federation by supplying a common forum that serves as an alternative to negotiation and war. Lest it be thought that this obstruction is a bit of an overstatement, it is instructive to look at the words of Justice Holmes in the similar case of *Georgia v. Tennessee Copper Co.*:

When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court.⁴¹

So what law should be used? Holmes in this quotation grasps the reasons for using a federal common law created for the occasion because such an approach provides a distillation of the best that common law principles can devise. In fact, this result is attractive because the general law of nuisance is not only uniform across jurisdictions, but also makes sense as a normative matter because of the protection that it provides innocent persons against the depredations of others.

Next, what kind of relief should be granted? Here, Missouri's complaint only sought injunctive relief, even though the private law in every legal system allows a court of equity to award damages to cover past harms associated with the violation.⁴² Otherwise, the defendant has enormous incentives to engage in delays because of its free ticket to pollute. Yet Missouri did not request that remedy, and one troublesome question is why.

⁴¹ 206 U.S. 230, 237 (1907).

⁴² For the Missouri version, see *Missouri ex rel Leonardi v. Sherry*, 137 S.W.3d 462, 469 (Mo. 2004) (“Under the doctrine known as equitable cleanup, courts of equity would occasionally grant, in addition to equitable remedies, relief obtainable at law when it was incidental to a request for equitable relief.” (citing Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176, 1181–82 (1961))).

One possibility is that the damage in question—the pollution—was not caused by the state but by multiple private businesses that operated along the banks of the Chicago River. Requesting the injunction does not require the defendant state to apportion damages, but it is an even more complex endeavor to impose the required forms of regulation on each of hundreds of separate businesses that contribute to the pollution. And if the state can be forced to assume that burden, why not also the lesser obligation paying of damages, which it could collect through taxation?

One conjectural complication in these cases deals with the application of sovereign immunity, but those words were not so much as uttered in *Missouri v. Illinois*. The quoted passage from Justice Holmes suggests that for disputes between sovereigns, the point of a national union was to waive the defense of sovereign immunity among states while retaining it for suits that ordinary individuals (either citizens or aliens) could bring against states in either state or federal courts.⁴³

Clearly, then, some waiver of sovereign immunity was necessarily contemplated in a suit that countenanced injunctive relief. If anything, a suit for damages, which allows a state to continue on a given course of action, looks to be less and not more intrusive. Why then would Missouri choose to voluntarily disarm on the question of damages? Clearly, something else was at work in driving Missouri to that decision because the usual rule treats damages as a standard remedy in all cases. Perhaps damages are avoided here because it is a greater affront for a court to reach into the state treasury, which activates complex internal budgetary and appropriate processes. But whether this intuition is sound or not, the legal position contains this irony. The federal “common law” that governs these disputes includes the judge-made law in courts of equity. How then could it not include the common law remedy of damages, or the equitable cleanup doctrine? Nothing in Article III suggests a division between these two—cash and specific relief—given that the judicial power extends to “all cases in law and equity,” including a dispute between two sovereign states. The correct conclusion seems therefore not to attach any structural or constitutional significance to Missouri’s decision to abstain from seeking damages. Both of these remedies seem appropriate given that sovereign immunity is not part of the grand equation.

Nonetheless, the case continued forward in litigation, presumably before a special master, with only the claim for injunctive relief. When the case came back to the Supreme Court, the substantive and evidentiary matters had sorted themselves out well. Justice Holmes reviewed the evidence

⁴³ See *Hans v. Louisiana*, 134 U.S. 1 (1890), which assembled the evidence that sovereign immunity was part of the original constitutional plan, and was not solely a creature of the Eleventh Amendment, which in any event applied only to suits by citizens of other states, and not to the states themselves, as well as citizens or subjects of foreign states.

in *Missouri v. Illinois II* with immense sophistication.⁴⁴ Even though Missouri's legal theory of interstate liability was impregnable, its proofs were shaky. The discharge from the Chicago River was followed by improvement, not deterioration, of the water quality in the Illinois River. The downstream increase of typhoid in St. Louis could easily have been attributed to the dumping of waste into the river by small towns in Missouri. Proving that the observed harms were causally linked to pollution was easy. But proving the linkage of the harms to pollution *from Illinois* was not. And using federal common law around 1900 was no big deal at all because *Swift v. Tyson* still controlled in this pre-*Erie* case. Yet once *Erie* rejected the existence of federal common law in diversity cases, it was more striking to apply that body of law in disputes between sovereigns. If the federal judges could not create common law in the one class of cases, why could they create it in the other?

Missouri v. Illinois was no fluke. Its line of cases shows a sensible application of the standard nuisance law principles, suitably tailored to take into account the special position of the sovereign. Thus, in *Georgia v. Tennessee Copper Co.*, the state of Georgia in its sovereign capacity brought an original action in the United States Supreme Court against *private* Tennessee companies whose copper operations caused great damages to both public and private lands within the state of Georgia.⁴⁵ Holmes did not tie Georgia's right of action to the damages to public property from the defendant's emissions, which Georgia conceded were "small."⁴⁶ Rather, the suit was brought in Georgia's "capacity of *quasi-sovereign*," where its rights were greater than the simple property rights of its citizens.⁴⁷ This point was thought important not because it strengthened the underlying substantive claim, but rather, as Justice Holmes insisted, because it takes more to infringe upon the control of a state sovereign than on the ownership interests of a private party.⁴⁸ Thus, Holmes argued, the Supreme Court should be more sparing in weighing equities in favor of the defendants:

If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up *quasi-sovereign* rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. The States by entering the Union did not sink to the position of private owners subject to one system of private law. This court has not quite the same freedom to balance the harm that will be done by an injunction

⁴⁴ See 200 U.S. 496 (1906).

⁴⁵ 206 U.S. at 236.

⁴⁶ *Id.* at 237 ("The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi-sovereign*.").

⁴⁷ *Id.* at 237–38.

⁴⁸ *Id.*

against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power.⁴⁹

The holding did not preclude, of course, some renegotiation whereby the levels of pollution could be increased upon payment from the firms to the state of Georgia for the benefit of its citizens. Nor does its logic appear to preclude an award of damages had they been requested. The decision carries with it the implication that even the federal government, through legislation, could not strip the state of its key sovereign attributes—a position that did not survive the post-New Deal era.

Other cases also fall into this federal common law framework. In *New York v. New Jersey*,⁵⁰ the Court denied New York an injunction against New Jersey because the evidence in the record did not establish the occurrence of serious pollution across state lines, in part because of the vast discharge of pollution from (and by) New York City into New York waters.⁵¹ But the Court left open the possibility of granting injunctive relief at a later stage if cross-state contamination were proved, which apparently did not happen.⁵² The evidentiary weakness at the early stage of the proceeding brought the issue of sovereign immunity to the fore. It is not proper to compel a state to engage in any action without a real factual foundation. But the posture of the case quickly changed. Once the evidence was clear, the preference for strong injunctive relief asserted itself. Ten years later, *New Jersey v. City of New York*⁵³ again came before the Supreme Court, and the Court granted the injunction in light of the powerful evidence that supported it.⁵⁴ In the course of its decision, the Court quickly dismissed two meritless arguments that New Jersey had advanced. The first was that the waste was not dumped in New York state waters but in international waters.⁵⁵ The second was that a federal statute controlled the matter.⁵⁶ Both of these received the short shrift they deserved. First, the injunction sought was against polluting, and it ran against the person. It does not matter where the defendant dumps its garbage; it matters where the harm takes place.

⁴⁹ *Id.* The opinion then goes on to note that the balance of hardships, given the closing down of the defendant businesses, did not loom large in this analysis. *Id.* at 238–39.

⁵⁰ 256 U.S. 296 (1921).

⁵¹ *Id.* at 311–12.

⁵² *Id.* at 313–14.

⁵³ 283 U.S. 473 (1931).

⁵⁴ *Id.* at 481–82.

⁵⁵ *Id.* at 482 (“Defendant contends that, as it dumps the garbage into the ocean and not within the waters of the United States or of New Jersey, this Court is without jurisdiction to grant the injunction. But the defendant is before the Court and the property of plaintiff and its citizens that is alleged to have been injured by such dumping is within the Court’s territorial jurisdiction. The situs of the acts creating the nuisance, whether within or without the United States, is of no importance. Plaintiff seeks a decree in personam to prevent them in the future. The Court has jurisdiction.”).

⁵⁶ *Id.* at 482–83.

The second argument is closer to the point addressed here. New York City's activities in New York City Harbor were in fact governed by federal regulations that provided, with exceptions not applicable here:

It shall not be lawful to cast, throw, empty, or unlade, or cause, suffer, or procure to be cast, thrown, emptied, or unladen, either from or out of any ship, vessel, lighter, barge, boat, or other craft, or from the shore, pier, wharf, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, slack, rubbish, wreck, filth, slabs, edgings, sawdust, slag or cinders or other refuse or mill-waste of any kind, into New York Harbor.⁵⁷

The Court, however, concluded without discussion that compliance with the statute bore no relationship to the common law nuisance action before it. The Court asserted:

There is nothing in the Act that purports to give to one dumping at places permitted by the supervisor immunity from liability for damage or injury thereby caused to others or to deprive one suffering injury by reason of such dumping of relief that he otherwise would be entitled to have.⁵⁸

The Court took the position that the private right of action in a quintessential stranger case was not affected by compliance with any system of regulation. In this instance at least, Baron Bramwell's views in *Powell v. Fall* carried the day, perhaps in part because the federal statute was massively underprotective. Yet by the same token, the issue of damages, which was central to the private claims at common law, was not part of this case. The use of public nuisance law was not confined solely to the discharge of pollution. In another similar case, interstate flooding from changes in local drainage methods was subject to the same federal public nuisance analysis, where once again, injunctive relief was the standard remedy.⁵⁹

B. Federal Regulation Meets Federal Common Law

Of these early cases, the only one that dealt with the interaction between federal common law and statutes was *New Jersey v. City of New York*. But with the rise of federal legislation, the question of preemption comes to the fore, not in its usual federal-state context, but in a purely federal dispute. The origin of the problem lies in the distinctive uneasiness over federal common law claims between sovereigns in the aftermath of

⁵⁷ Act of Aug. 5, 1886, ch. 929, § 3, 24 Stat. 310, 329, *superseded by* Act of June 29, 1888, ch. 496, § 1, 25 Stat. 209 (codified at 33 U.S.C. § 441) (“[T]he placing, discharging, or depositing, by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound, within the limits which shall be prescribed by the supervisor of the harbor, is hereby strictly forbidden . . .”).

⁵⁸ *City of New York*, 283 U.S. at 482–83.

⁵⁹ See *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923).

Erie v. Tompkins, which on its facts only dealt with diversity jurisdiction.⁶⁰ There are numerous doubts about the constitutional foundations of *Erie*.⁶¹ It is unclear why the judicial power of the United States, extended to all cases in law and equity, does not give the federal courts the power to fashion substantive laws for any case that falls within its jurisdiction unless trumped by statute or constitutional considerations. The recognition of this federal power is even more insistent in matters that come to the Court as part of its original jurisdiction, where conflicts between states surely invite state legislation that tilts the table in the state sovereign's direction. If there are no statutes on the matter, can there really just be no law to apply? In diversity cases, that void never exists, given the plenary power of state common law; instead, the key worry is with the strategic implications of using one substantive approach in federal court and another in state court, which can always be answered by state legislation that removes the cases from the reach of the common law. But when these disputes are between states themselves, the matter is simpler because the forum shopping issue disappears. The only party that could upset the Supreme Court's decision on these matters is the United States Congress, and it speaks with a uniform voice in all disputes.

This general conclusion in favor of a strong body of federal common law is not mine alone. Professor Robert L. Glicksman has thoroughly analyzed various legal regimes that seek to measure the mix of legitimacy, individual liberty, accommodation, and efficiency, all of which are themes that run through this Article.⁶² And his conclusion is the same as mine: only the federal common law approach gets the clean bill of health.⁶³

This is not the place to recapitulate Professor Glickman's arguments, but it is instructive to examine some of the procedural tangles that emerged in *Illinois v. City of Milwaukee (Milwaukee I)*.⁶⁴ That decision held, on matters collateral to the same point, that the Supreme Court had original, but not exclusive, jurisdiction over a suit that one state brought against a municipality of another state.⁶⁵ The Court then exercised its discretion to remit the plaintiff to federal district court.⁶⁶ The earlier decision in *Georgia v.*

⁶⁰ 304 U.S. 64 (1938).

⁶¹ See, e.g., Henry Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964) (addressing the criticisms of *Erie* but ultimately coming to its defense).

⁶² Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121 (1985).

⁶³ *Id.* at 138.

⁶⁴ 406 U.S. 91 (1972).

⁶⁵ *Id.* at 97 (“We conclude that while, under appropriate pleadings, Wisconsin could be joined as a defendant in the present controversy, it is not mandatory that it be made one.”).

⁶⁶ *Id.* at 108 (“While this original suit normally might be the appropriate vehicle for resolving this controversy, we exercise our discretion to remit the parties to an appropriate district court whose powers are adequate to resolve the issues.”).

*Tennessee Copper Co.*⁶⁷ was expressly affirmed, and the issue of possible federal preemption did not arise because the Water Pollution Control Act contained a savings clause that “[s]tate and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by Federal enforcement action.”⁶⁸ The use of the federal common law in these early cases supported the separability thesis, which allowed common law actions to survive without regard to the expanded systems of direct regulation. Justice Douglas wrote for a unanimous court:

It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.⁶⁹

The entire approach to federal common law changed sharply, however, in *City of Milwaukee v. Illinois (Milwaukee II)*,⁷⁰ which used a standard preemption analysis to hold that the federal common law of nuisance had been preempted by the articulation of elaborate and comprehensive statutory permit standards in the Federal Water Pollution Control Act Amendments of 1972 (WPCA)⁷¹ to the Clean Water Act (CWA).⁷² Reflecting the ever greater complexity of the matter, the statute also contained a savings clause that read: “Except as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.”⁷³

It is useful to first address the basic provision before turning to the savings clause. Justice Rehnquist, for the majority, held that the WPCA barred the state of Illinois from bringing a garden variety action to abate a public nuisance against the City of Milwaukee, again without any claim for damages.⁷⁴ Milwaukee had not complied with the federal standard, so the plaintiff would have been allowed to go forward with its private nuisance suit under the test from either *Powell v. Fall* or *Taff Vale*, at least if damages

⁶⁷ 206 U.S. 230 (1907).

⁶⁸ *Milwaukee I*, 406 U.S. at 104 (alterations in original) (quoting Water Pollution Control Act of 1948, 62 Stat. 1155 (codified as amended at 33 U.S.C. § 1151 (1970), omitted as superseded by Pub. L. No. 92-500, § 2, 88 Stat. 816 (1972))) (internal quotation marks omitted).

⁶⁹ *Id.* at 107.

⁷⁰ 451 U.S. 304, 313–17 (1981).

⁷¹ Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1251 (2000)).

⁷² See Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948). This statute was a precursor to the modern Clean Water Act.

⁷³ 33 U.S.C. § 1370 (2000). The full section contains a provision that preserves the right of the state to adopt “any requirement respecting control or abatement of pollution” so long as the state standards are as stringent as the federal ones. *Id.* The clear inference from § 1370(1) is that it deals with administrative matters, leaving § 1370(2) to deal with common law and jurisdictional questions.

⁷⁴ *Milwaukee II*, 451 U.S. at 325–32.

had been sought. The strict liability issue that divided those two decisions would have only influenced the residual damages question, with full damages under the strict liability formula, and lesser damages—equal to the *excess* over the level of harm that would have occurred had there been compliance with the federal standard—under the negligence formula. In this situation, the hard question is why the comprehensive federal system ousts the private right of action, here by occupying the field, when it affords *less* protection than would be obtainable under the earlier cases. One possible answer is that the only way to abate the nuisance is to deviate from the remedial steps required under federal administrative law, which raises a “conflict” preemption claim that has much more traction than the field occupation claim. Otherwise, it is hard to see why any comprehensive statute that is passed to control pollution should leave states more vulnerable than they were before the passage of the statute. In this case, Congress passed the statute at issue shortly after *Milwaukee I* affirmed that the traditional federal nuisance remedy had not been preempted.

The reasons that Justice Rehnquist advanced to support his preemption argument seemed singularly ill-suited to the task. His first argument rested on the post-*Erie* dissatisfaction with any appeal to federal common law,⁷⁵ which raised howls of protest from the dissent, who referred to the earlier public nuisance cases governed by federal law.⁷⁶ Rehnquist’s statement reflects the rejection of federal common law in diversity cases, which flows from *Erie*’s broad declaration that “[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.”⁷⁷ That proposition rests on some earlier cases that took the same line, even in the context of public nuisance. In *Willamette Iron Bridge Co. v. Hatch*, the plaintiff sought to enjoin the operation of a bridge authorized under state law that obstructed travel along a navigable river in interstate commerce.⁷⁸ The Supreme Court refused to use its power to enjoin the state’s action in the absence of any congressional statute on the grounds that the case did arise under the Constitution or the laws of the United States.⁷⁹ Reading the word “laws” to cover legislative enactments only, the Court held that “there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction.”⁸⁰

The rejection of federal common law is not sufficient to carry the day. One explanation is that the word “laws” does not cover common law devel-

⁷⁵ *Id.* at 312.

⁷⁶ *Id.* at 337–38 (Blackmun, J., dissenting).

⁷⁷ *Id.* at 312 (majority opinion).

⁷⁸ 125 U.S. 1, 2–3 (1888).

⁷⁹ *Id.* at 8–9.

⁸⁰ *Id.* at 8.

opment. The dissent in *Milwaukee II* pointed to the select group of post-*Erie* cases in which federal common law has survived to serve some specialized national interest, for example, the operation of federal commercial paper,⁸¹ or a national labor law system.⁸² These decisions are, of course, inconsistent with the categorical quality of Rehnquist's pronouncements for the majority. But the case against his decision does not rest solely on the ad hoc creations of federal common law in the post-*Erie* period. The relevant considerations are more fundamental. If the word "laws" does not permit the development of a federal common law in diversity cases, then the same must hold for the development of a federal law of admiralty, because the same narrow reading of "laws" covers both grants of federal power. In addition, the entire body of federal common law must be misplaced with respect to disputes between states, even though no choice of law formula neatly explains which state law should govern when pollution starts in one state and ends in a second. Yet neither admiralty nor the controversies between states merited a moment's attention in *Erie*, which at times appears to equate the question of the existence of all federal common law with its use in diversity cases, to which the Court repeatedly refers.

The sensible solution in the modern context is to follow the lead of the earlier federal common law cases and to allow the injunction against the nuisance. This exercise of judicial power presents no serious danger of the federal courts running wild because any nuisance that blocks navigation is, without question, subject to direct regulation by Congress under any interpretation of the Commerce Clause. Wherever Congress can legislate, the federal courts are entitled to make default rules in the absence of legislation, based on the identical common law techniques used in the state courts. There is little question that the scope of this federal judicial power expanded enormously upon the completion of the Commerce Clause revolution in 1937, one year before *Erie* was decided.⁸³ But any improper expansion in the judicial role lies in the Court's flawed Commerce Clause jurisprudence, not in the exercise of the federal judicial power under Article III. There is therefore good reason to resist the *Erie* revolution that drove so much of Rehnquist's logic in *Milwaukee II*.

Nor is it persuasive to claim that the federal common law of nuisance rested on "often vague and indeterminate nuisance concepts" that were properly preempted by "the establishment of a comprehensive regulatory

⁸¹ *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

⁸² *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). This decision is almost surely wrong. Justice Douglas posited the existence of a federal common law of contracts for labor disputes to salvage a statute that purported to confer general jurisdiction on federal courts in the absence of either a federal question or diversity jurisdiction. The proper answer was to refuse to fabricate the law when state courts remained open in contract cases.

⁸³ See *Wickard v. Filburn*, 317 U.S. 111 (1942). For my critique of the Commerce Clause cases, see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

program supervised by an expert administrative agency.”⁸⁴ This statement compresses into a single sentence the persistent misconceptions of the New Deal. First, Rehnquist’s claim clearly underestimates the coherence and clarity of the common law of nuisance, both on the liability and the remedy side. Indeed, the general protest of “vague and indeterminate” concepts is not followed by a single instance of how those defects manifested themselves in any early federal common law decisions. Quite the opposite: the strong conceptions of physical invasion and state autonomy clarified the use of these common law principles by removing some of the Court’s discretion to deny injunctions that could arise when only private parties were involved in the litigation.⁸⁵

At the same time, Justice Rehnquist’s deference to administrative expertise is second best to the older judicial approach, which tailored injunctions to harmful outputs while allowing the parties to figure out how to restructure their business to remain in operation without harming the interests of others. If the parties could not so restructure their operations, then Baron Bramwell is still right: it is best that they go out of business altogether.⁸⁶ The administrative law effort to force technology through direct regulation puts too much control in the hands of administrators who have too little knowledge of the underlying business. Even in a unitary legal system, the state should concentrate first on stopping the harmful externality, while leaving it to the private parties to figure how this could best be done. It is odd to attribute administrative expertise to a statute, which while constitutional, takes the wrong overall approach.

Thereafter, Rehnquist’s argument turns to the comprehensive nature of the regulatory scheme. That argument has real pop with respect to such matters as the conclusive power of FDA warnings in ordinary product liability actions.⁸⁷ But in nuisance cases, the use of statutory standards as a defense does not solidify a weak assumption of risk defense as it does in drug cases, where buyers easily can be made aware of the conditions on

⁸⁴ *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 317 (1981).

⁸⁵ See Brenner, *supra* note 4, at 407 (noting that damages were the general remedy in England except in serious cases during the nineteenth century). The American cases were more liberal in granting injunctions. See *Campbell v. Seaman*, 63 N.Y. 568 (1876). More recently, it seems clear that injunctive relief for threatened or continuing nuisances is made more freely available, subject to some judicial discretion in “balancing the equities.” See generally William Q. de Funiak, *Equitable Relief Against Nuisances*, 38 KY. L.J. 223 (1950). For disputes over the conditions under which these injunctions should be granted, see *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (exercising discretion to deny injunctive relief, over dissent). See also Epstein, *supra* note 5, at 88–89 (noting the need to mix and match remedies in nuisance cases). For examples of how this works, see *Pendoley v. Ferreira*, 187 N.E.2d 142 (Mass. 1963) (permanently enjoining the operation of defendant’s piggery but delaying the closing to allow an “orderly” liquidation of his business). On “balancing” equities generally, see *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994 (1965).

⁸⁶ See *Powell v. Fall*, (1880) 5 Q.B. 597, 601.

⁸⁷ Richard A. Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, J. TORT L., Dec. 2006, <http://www.bepress.com/jtl/vol1/iss1/art4>.

which products are sold before the purchase or use takes place. Stated otherwise, the preservation of a tort remedy in *Milwaukee II* would limit the danger of externalities. In contrast, allowing private rights of action in the product liability sphere magnifies the allocative distortion by making it impossible for persons to waive risks by contract in order to acquire products, like drugs, that they may desperately need.

In one sense, the entire argument here is a side show if the savings clause quoted above preserves a common law action for nuisance.⁸⁸ Justice Rehnquist's antipathy to federal common law carried over to the savings clause, which he brushed off:

It is one thing, however, to say that States may adopt more stringent limitations through state administrative processes, or even that States may establish such limitations through state nuisance law, and apply them to in-state dischargers. It is quite another to say that the States may call upon *federal* courts to employ *federal* common law to establish more stringent standards applicable to out-of-state dischargers.⁸⁹

He is quite right to point out the difference, which is why we needed federal common law in the first place. It is worth noting that this complex statute allows states to raise, but not to lower, the applicable standards that the federal government imposes.⁹⁰ But the entire thrust of the statute is to toughen the laws, so it seems gratuitous to knock out the extra protections that the federal common law offered. The efficient interaction between ex ante requirements and ex post damage remedy is to allow the latter unconditionally, no matter how high the substantive standards. In the case of statutory silence, that presumption should control.

Ironically, this diversion would have been entirely unnecessary if he had read the savings clause correctly in the first place.⁹¹ Start with the critical phrase “right or jurisdiction” and parse the two key words in reverse. “Jurisdiction” allows each state to apply its usual actions for state common law nuisance for in-state disputes between private parties, just as before the Clean Water Act. Against this backdrop, the term “right” covers all the private rights of action where the state does not have exclusive control, which is precisely the area of federal common law—to govern that over which no state has exclusive jurisdiction. Why else would the savings clause explicitly refer to “boundary waters”? So the phrase that “nothing shall be construed to impair or affect any such right or jurisdiction” means what it says: the old federal common law rules survive. Plain meaning, historical context, and the avoidance of constitutional confrontations all work in the same

⁸⁸ See *Milwaukee II*, 451 U.S. at 327–28.

⁸⁹ *Id.*

⁹⁰ See 33 U.S.C. § 1370 (2000).

⁹¹ See *id.* The clause reads, “[e]xcept as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” *Id.*

direction. The savings clause preserved the federal common law right of action recognized in *Milwaukee I*.

C. Federal Preemption of State Law Remedies

The final step in this convoluted journey asks how the various heads of federal preemption ought to apply in cases where the federal regulation of nuisances is invoked to preempt state law actions. As before, the claim for preemption rests on the same New Deal outlook that drove Justice Rehnquist in *Milwaukee II*, namely that the right states have to participate in the legislative and administrative processes affords adequate compensation for the loss of the private right of action.⁹² On this issue, Rehnquist placed far too much faith in the supposed expertise of modern administrative law. Unfortunately, the New Deal realignment that degraded the constitutional status of private property has substituted talk for protection, and it is hard—even for those who do not show great affection for the Takings Clause—to rely on the grand social experiment with complex administrative systems to dispense with the stronger protection that property rights offered. In this regard, the takings arguments (under which aggrieved landowners would receive compensation for loss of property rights) are of uncertain value because of the historical distinction between those actions that commit takings (like permanent flooding) and those that simply cause damage, as with common law nuisances, where the state makes no claim to retain use of the damaged property.⁹³ Even if we put a constitutional takings argument to one side, however, for analytical purposes it still pays to take the compensation issue more seriously. Quite simply, the key question is whether any state or private litigant would be satisfied to receive a bundle of process rights in exchange for its previous federal cause of action. It is a bad deal behind the veil of ignorance. The property rights were well defined, and far cheaper to enforce than the complex ad hoc administrative schemes put into their place. The new politic is more expensive and less secure, and the consequences are most unfortunate, especially for a state located downstream from polluters.

These difficulties become evident in the makeshift compromise that the Court adopted in *International Paper Co. v Ouellette*.⁹⁴ There, Justice Powell attacked the thankless question whether the CWA preempted any state law cause of action for nuisance brought by a citizen in one state against the citizen in another. The case arose when the International Paper Company, a

⁹² For an articulation of this position, see Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS, *supra* note 1, at 166; for its classic articulation, see Richard B. Stewart, *The Reformulation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

⁹³ For criticism, see RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 37–39 (1985).

⁹⁴ 479 U.S. 481 (1987).

New York corporation, discharged pollutants in Lake Champlain that caused damage to the plaintiff property owners on the Vermont side of the lake. Here it is not one state suing another state, although there is no reason why the state of Vermont could not have sued in its *parens patriae* role. Unlike earlier public nuisance actions, these plaintiffs asked for both actual and punitive damages as well as injunctive relief, so the choice of liability regimes for completed harms was again on the table.

That question would not have arisen if the CWA's savings clause had been read in *Milwaukee II* to preserve the federal common law right of action for interstate nuisance. But that was, quite literally, water over the dam. Left with this unhappy legacy in *Ouellette*, Justice Powell considered a number of alternatives. One of the positions he rejected was that taken by the Seventh Circuit in *Milwaukee III*, which held that no action for nuisance could be maintained to the extent that it applied the law of *either* state to pollution in one state that had its source in another state.⁹⁵ The second position he rejected was that adopted by the district court below, which allowed actions under the law of the state where the injury occurred, here Vermont, because its relief would "merely *supplement* the standards and limitations imposed by the act."⁹⁶

For Justice Powell and the Supreme Court, the only suits that escaped preemption were those in which the defendant was charged with violating laws of its own state, here New York. In *Ouellette*, Justice Powell took the position that, notwithstanding the comprehensive nature of the CWA, it created only a partial ban on private litigation, so that one state could sue for pollution caused in a second state, but only under the laws of the offending state.⁹⁷ This decision is odd because the substantive differences between state and federal common law actions are not easily discernible. If the CWA occupies the field with respect to federal causes of action, why should it not occupy the field with respect to state causes of action as well? The presumption against preemption in *Rice v. Santa Fe Elevator Corp.*, which dealt with alternative regimes to regulate warehouses,⁹⁸ provides only a partial answer,⁹⁹ given the muddy interrelationships between the legislative history and the savings clause.

Accordingly, Justice Powell retreated to structural matters. He therefore held that Vermont could not use its law to deal with New York if its statutory standards imposed requirements more stringent than those de-

⁹⁵ *Id.* at 484–85 (discussing *Illinois v. Milwaukee (Milwaukee III)*, 731 F.2d 403, 414–15 (1984), *cert. denied*, 469 U.S. 1196 (1985)).

⁹⁶ *Id.* at 486–87 (quoting *Ouellette v. Int'l Paper Co.*, 602 F. Supp. 264, 271 (D. Vt. 1985)).

⁹⁷ *Id.* at 497–99.

⁹⁸ 331 U.S. 218 (1947).

⁹⁹ *Ouellette*, 479 U.S. at 491–92. See *supra* note 12 for a fuller account of *Rice*.

manded either by the United States or New York.¹⁰⁰ That argument makes sense to the extent that the more severe form of injunctive relief could require steps that are inconsistent with the federal regulation, but it does not explain why the private damages action should be barred when it permits the defendant to make whatever adaptations in behavior it chooses, none of which would conflict with federal law. In effect the proper reconciliation is the opposite of that in the pre-CWA cases: allow the damage action but deny the injunction.

Viewed more broadly, the decision to choose between state laws looks rickety no matter which way it comes out. *Ouellette's* compromise blocks the obvious efforts at favoritism that the victim state could create for its own citizens, but it does nothing to counter the favoritism risk by allowing the polluting state to set standards. The stakes are every bit as large for the polluting state: it could easily lobby the federal government to lie low, and then do little on its own. The case therefore falls into the pattern of the decisions involving, for example, the apportionment of water between two states, where the law of neither state is appropriate, especially if it could be modified by statute.¹⁰¹ In these cases, therefore, we have the odd situation in which there should be a presumption against preemption, but not in favor of state law, as the New Deal synthesis would have it. Rather, the vehicle of choice in these cases should be federal common law, which is the only available source of neutrality. *Ouellette* gives us half of a loaf, which is better than none. But this is an instance in which the use of the federal common law is preferable to that of the state. The damage of *Milwaukee II* still needs to be undone.

III. PARTING WORDS: WHAT SHOULD BE DONE

The question here is what should be done, and on this point, a sensible solution is close at hand. There is no doubt that Congress today could regulate directly any interstate dispute under the Commerce Clause. It did so, for example, under the Ports and Waterways Act.¹⁰² In *United States v. Locke*, the Court took the correct position that a savings clause for common law nuisance actions did not justify extensive state regulation of the management vessels in the harbor when that regulation disrupted the operation

¹⁰⁰ *Ouellette*, 479 U.S. at 495 (“The affected State’s nuisance laws would subject the point source [e.g., the New York defendant] to the threat of legal and equitable penalties if the permit standards were less stringent than those imposed by the affected State.”).

¹⁰¹ See the apportionment cases cited in the dissent in *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 335 (1981). These cases include *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938); *Cissna v. Tennessee*, 246 U.S. 289, 296 (1918); *Kansas v. Colorado*, 206 U.S. 46, 117–18 (1907) (apportioning waters of an interstate stream); and *Howard v. Ingersoll*, 54 U.S. (13 How.) 381 (1851) (dealing with interstate boundary disputes).

¹⁰² 33 U.S.C. §§ 1221–1236 (2000). The local statute in conflict was WASH. ADMIN. CODE § 317-21-130 (1999).

of the vessel outside the state.¹⁰³ But it left intact the private right of action for damages. Longstanding injunctions are not an issue given that boats usually move in and out of harbors, but there is no reason to think that this approach should be limited to any one context.

Congress might be well advised to pass a more general statute that in essence says that all suits between two states, between the citizens of one state and another state, or between citizens of different states should be regulated by the federal common law of nuisance. And where does that unique body of federal law come from? Why, state common law of course, or English common law if one prefers. That point could be made clear in one of two ways. The first, and simpler, view is to say that in enforcing this provision, the courts should look to their own prior decisions on the scope and meaning of the federal common law. If that solution is thought to be incomplete, Congress could designate the *Second Restatement of Torts* and its rules on nuisances and other torts between strangers as the official source of the applicable law.

It may seem odd that one resorts to state common law principles to flesh out the details of federal common law, but the practice is more common than one might suppose. Here are three brief examples of how it works. Closest at hand is the decision of the Supreme Court in *Lucas v. South Carolina Coastal Council*,¹⁰⁴ which referred to the common law of nuisance in its own effort to define a workable definition of the police power where state regulation deprived a landowner of all viable economic use.¹⁰⁵ Similarly, in *Ruckelshaus v. Monsanto Co.*,¹⁰⁶ the Supreme Court relied on the *Restatement* definitions of trade secrets in finding that these were entitled to protection under the Takings Clause.¹⁰⁷ Finally, in dealing with the balance between the rights to privacy and the public privilege of newsworthiness, courts have relied on the *Restatement* formulations as well.¹⁰⁸

There is a strong moral realism that underlies these decisions. In itself this attitude is a healthy corrective for the constant efforts to treat all legal doctrines as incurably subjective, which makes it hard for anyone to care which rule is chosen. But in cases where self-interest is so palpable, it is

¹⁰³ 529 U.S. 89 (2000).

¹⁰⁴ 505 U.S. 1003 (1992).

¹⁰⁵ *Id.* at 1020–26.

¹⁰⁶ 467 U.S. 986 (1984).

¹⁰⁷ *Id.* at 1001 (“The Restatement defines a trade secret as ‘any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.’” (quoting RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939))).

¹⁰⁸ RESTATEMENT (SECOND) OF TORTS, § 652D (1977) (“One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”); see *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128–29 (9th Cir. 1975).

asking for trouble to rely on the actions of individual states—their statutes as well as their common law. So adhering to a set of principles that predate the particular dispute places us neatly behind a veil of ignorance, which is where we should all seek to be. Our highest constitutional ideals are in fact preserved by the articulation of a federal common law of nuisance for interstate disputes that survives quite nicely the administrative controls of the modern welfare state.